Environmental Review Rules: Housekeeping, Technical & Other Procedural Revisions Identified by EQB Staff
Summary of Recommendations to the Environmental Quality Board on
October 21, 2004, with Revisions and Board Comments Noted*

Rule Part Number	Problem or Issue	Recommendation
1. 4410.0200, subp. 37, defn, of "hazardous waste"	A pending MPCA rulemaking will amend the section of MPCA rules to which this subpart refers.	-Change as follows: amend the citation to be consistent with MPCA proposed rule amendments
2. 4410.0200,subp. 9b, defn. of "connected actions"	The defn. is incomplete respect to condition "B."	- Changes as follows: add at the end of "B" "and the prerequisite project is not justified by itself
3. 4410.0200, subp. 10, defn. of "construction" Comm. Corrigan suggested that definition be amended to exclude "preparation of land" for some types of projects. See also item #19 regarding this issue.	EQB historically equates starting a project to be equivalent to undertaking anything meeting the definition of construction, including site preparation (e.g., clearing and grading). However, some state permits allow grading and clearing prior to issuance.	-Changes as follows: amend the sentence regarding preparation of land with text shown in italics: "It includes preparation of land*, except when [develop criteria to insert here re land already having been disturbed ,* and fabrication of facilities."
4. 4410.0200, subp. 81, defn. of "sewered area" Some concern by Bd/TReps that change may be perceived as raising threshold for residential, at same time as considering new lakeshore categories.	Defn. is unclear about status of community septic tank systems (often used for lakeshore developments). The 1982 SONAR indicates that centralized septic tank systems serving the entirety of a project and owned by the homeowners collectively was intended to be included in this definition, although the wording is not clear about that.	- Changes as follows: after "publicly owned" insert "or homeowner owned"

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5. 4410.0200, subp. 92, "wastewater treatment facility"	There is ambiguity about the meaning of "on-site treatment facilities" as used here. The 1982 SONAR indicates that as used here, the term meant wastewater treatment facilities other than municipal facilities built by the proposer "on site" to serve a particular development. The sentence containing the term was included then to ensure that such facilities were included under the definition. However, since 1982, the term "on-site treatment" has commonly been used for septic tank and drainfields or other small-scale treatment serving an individual residential lot. It appears that the sentence could be deleted to avoid this problem without causing other complications.	- Change as follows: delete the 2nd sentence ("It includes…facilities.")
6. 4410.1000, subp. 5, when new EAW is required Support from some Bd members for both criteria ("and/or"). Concern about changing plans not being considered.	Rule only requires new EAW if project – not circumstances – changes and has no time limit. This is different than conditions under which an EIS supplement is needed.	- Changes as follows: add a time limit on validity of EAW (3 or 5 years?) if the project is not built; <u>and/or</u> add that significant change in circumstances (as well as in the project) requires a new EAW.
7. 4410.1100, subp. 1, when does the prohibition on governmental decisions begin when a <u>citizens' petition</u> is filed? Bd concerns about EQB taking responsibility for petition "completeness" and potential inconsistencies with other wording in subpart (such as "receipt").	Law is unclear about the point in time that the prohibition on governmental decisions to approve a project begins when a petition is filed – is it when it arrives at the EQB offices, when the EQB staff verifies its completeness, or when the RGU is notified by the EQB staff? The rule gives the EQB staff 5 working days to review a petition for completeness and to forward it to the assigned RGU (although EQB staff	- Changes as follows: add language stating that a petition is considered "filed" upon EQB determination that it is complete. Alternatively, amend 4410.3100, subp. 1 to read: " …or if a petition is filed under part 4410.1100 *that complies with the requirements of subparts 1 and 2 of that part*…" (revision shown by italics)

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[NOTE: in response to the Bd's concerns, in this version the issue has been recast as question of when 4410.3100 prohibitions go into effect rather than what "filed" means.]	practice is to complete this within 1 to 2 days). Until the petition is verified as complete and the RGU is notified, is the RGU (or other governmental units) prohibited from taking action on permit applications?	
8. 4410.1100, subp. 6, RGU decision on need for an EAW when petition filed	The standard in this rule does not address whether or not the RGU should consider mitigation and regulation applicable to the project.	- Changes as follows: add language specifying the RGU should consider the extent to which the project is subject to mitigation and regulation.
9. 4410.1200, EAW content requirements Board raised question of possible implications of adding specific mention of cumulative impacts to EAW contents requirements.	The Sierra Club has pointed out that the EAW requirements do not now address compatibility of the project with approved local plans List of contents does not mention cumulative impacts.	- Changes as follows: insert a new item G: "compatibility of the project with local government approved plans" and add "cumulative impacts" either to list in item C or as a new item.
10. 4410.1400, EAW preparation	The rule now states that after the proposer submits the completed data portions of the EAW to the RGU, the "RGU shall promptly determine whether the proposer's submittal is complete." EQB staff frequently hears of disputes between RGUs and proposers over what "promptly" means. The rules should be clarified with respect to how long the RGU has to review the submittal for completeness.	- Changes as follows: delete the word "promptly" and at the end of the sentence add: "within 30 days or such other time period as the RGU and the proposer agree upon."
11. 4410.1500, A, EAW distribution	The list of institutions to which the EAW must be distributed is out-of-date.	- Changes as follows: delete #8, the Legislative Reference Library (at their request); add the Office of the State Archeologist and the Indian Affairs Council

12. 4410.1700, subp. 2a, time extension for EIS need decision	The rule only allows for an extension of 30 days to get missing information while in practice longer extensions frequently taken if proposer agrees	- Changes as follows: after "for not more than 30 days" add "or such other period of time as the proposer and RGU agree upon."
13. 4410.1700, subp. 3, form & basis of EIS need decision	In cases where the RGU issues a positive declaration, the rule now requires that the RGU also develop a draft scope at the same time. In practice, this has proven to be very difficult for governmental units to do. It would be preferable to allow the RGU to have a period of time after ordering an EIS to develop a proposed EIS scope.	- Changes as follows: Delete the 2nd sentence ("If a …for the EIS") and in the 3rd sentence, delete the phrase "and the proposed scope" NOTE: also see at 4410.2100, subp. 4 below for additional changes to the procedure to scoping after a positive declaration.
14. 4410.1700, subp. 7, EIS need criteria, item B	Wording is not consistent with related definition of cumulative impacts.	-Changes as follows: reword item B to use language consistent with the defn. of cumulative impacts.
15. 4410.2100, subp. 4, EIS scoping for discretionary EISs (i.e., those ordered through EAW process)	Scoping procedures and schedule do not acknowledge need to receive payment for scoping costs.	-Changes as follows: Revise item A by deleting "positive declaration" in the first sentence and replace it with "public scoping meeting." Add to beginning of 2nd sentence: "Within 5 days of receipt of the proposer's scoping cost payment pursuant to part 4410.6500, subpart 1, item A," Revise item B as follows: delete "30 days…EQB Monitor" and replace with: "15 days after the public scoping meeting".
16. 4410.2100, subp. 8, amendment of scoping decision	Current rule implies that whenever the scope changes, an amendment document must be released. If the draft or final EIS document is near release, it would be more efficient to announce the scope change in	- Changes as follows: At the very end of the subpart add the sentence: "The notice may be incorporated into notice of the draft or final EIS availability."

	the notice of those documents rather than as a separate notice document.	
17. 4410.2300, EIS content	Instead of "piggy-backing" on the EAW information, EIS documents tend to repeat and elaborate on information that appeared in the scoping EAW.	- Changes as follows: add this text at the very beginning: "An EIS must use to the extent possible information presented in the EAW for the project. Supplemental information shall be added as necessary to characterize potentially significant impacts, investigate the need for or effectiveness of possible mitigation, or to evaluate alternatives."
18. 4410.2800, subp. 3, EIS time limits	Rule does not explicitly provide for delays due to other rule provisions, such as proposer failure to pay EIS cost assessment.	- Changes as follows: revise EIS timeframe to extend it if proposer fails to pay EIS assessed costs on time. See also at 4410.6500.
19. 4410.3100, subp. 1, prohibitions on governmental decisions and construction when Environmental Review is required. See also item #3 re defn. of construction.	(1) Rules are not clear about when the stated prohibitions begin in the case of a petition being filed – see discussion at part 4410.1100 (item #7) (2) This rule uses the terms "started" (with respect to a project) and "begin a project" but does not specify their exact meanings. Long-standing practice is to equate these terms with the initiation of "construction" which is a defined term (at 4410.0200, subp. 10.).	(1) See the recommendation at part 4410.1100, item #6. (2) Changes as follows: At the end of subpart 1 add the sentence: "To start or begin a project means to take any action within the meaning of construction as defined at part 4410.0200, subp. 10."
20. 4410.3610, subp. 1, AUAR process-applicability	Amendment in 1997 inadvertently creates ambiguity over what types of projects are	- Changes as follows: Revise wording to delete definition of "light industrial" and

	not eligible for review under an AUAR.	simply list categories of projects not eligible for AUAR. In list of ineligible project types, include only item B & C of subpart 18, and exclude item A, so that wastewater treatment facilities cannot be reviewed by the AUAR process but sewer systems can be.
21. 44103610, subp. 4, content of AUAR form	Current rules do not require a draft version of the mitigation plan with the draft AUAR. Reviewers would like to have a draft plan to review along with the impact analysis instead of needing to wait for the final AUAR.	- Changes as follows: add phrase requiring the AUAR form to provide for a mitigation plan at both the draft and final AUAR stages.
22. 4410.3800, subp. 5, criteria for ordering a GEIS	Existing criteria do not cover all reasons why a GEIS might be ordered. Two additional reasons have been identified.	- Changes as follows: add two new criteria items to the list: (1) degree to which the cost of obtaining basic information ought to be borne by the public rather than individual project proposers; (2) need to explore issues raised by a type of project that go beyond the scope of review of individual projects.
23. 4410.3800, subp. 8, relationship of a GEIS to project-specific review	The *Governor's Primary Forest Products Advisory Task Force Implementation Environmental Review and Permit Streamlining Subcommittee* Final Report, dated July 20, 2004, recommends that the EQB amend this section of its rules to provide that, under limited circumstances, a GEIS may directly substitute for review of specific projects.	- Changes as follows: revise the first sentence as follows: "Preparation of a Generic EIS does not exempt specific activities from project-specific environmental review, unless the activity is declared to be exempt from project-specific review by the EQB when it orders the Generic EIS and any conditions specified by the EQB as necessary for the Generic EIS to be used as a substitute for project-specific environmental review have

		been satisfied. Conditions shall include, but not be limited to, the continued validity of material assumptions and timely implementation of any mitigations identified in the Generic EIS."</u>
24. 4410.3800, subp. 8, relationship of a GEIS to project-specific review Board concerned about creating more risk of lawsuits against the RGU by making this revision	The current rule requires an RGU to receive a determination from the EQB about whether the GEIS "remains adequate" prior to use of GEIS information in the review of a specific project. This is very inefficient for proposers and RGUs, and problematic for the EQB. The record of the 1982 rulemaking indicates that the origin of this provision was concern by project proposers that RGUs would ignore GEISs and require proposers to prepare individual analyses of issues already covered by the GEIS. Thus, the original intent was to force the use of GEISs. In practice, however, the issue has been the opposite – concern from environmentalists that RGUs overly rely on the GEIS, avoiding examination of issues with regard to specific projects. Thus, the focus has become the "if the EQB finds the GEIS remains adequate" part of the sentence. In earlier drafts of the rule in 1982, it was the RGU which determined if the GEIS remained adequate. At some stage of the rulemaking, the "EQB" was substituted for the "RGU", apparently without regard for the possible administrative problems this	- Changes as follows: amend the text as follows "Project-specific environmental review shall use information in the Generic EIS by tiering and shall reflect the recommenda-tions contained in the Generic EIS unless the RGU determines that the information or recommendation is not appropriate for use in the project-specific review."

	could cause. Also, the EQB has had a very difficult time trying to apply the "remains adequate" standard. Overall, this sentence has turned out to be a troublesome solution to a problem that does not exist, and should be amended.	
25. 4410.4300, subp.19, residential development	The threshold description does not recognize that comprehensive plans or annexation agreements may plan an area for future urbanization that is not yet reflected in the zoning ordinances.	In the 2nd sentence, after "applicable zoning ordinance" add "comprehensive plan, or annexation agreement."
26. 4410.4400, subp. 14, residential development	See 4410.4300, subp 19.	See 4410.4300, subp 19.
27. 4410.4600, subp. 2, item D, standard exemption Some Board support for deleting "implementation" here.	Current wording states that a project is not exempted until construction is substantially completed and construction and "implementation" could no longer be influenced by EIS information. The rule does not specify what "implementation" here refers to, and it has been interpreted to mean the operation of a project after construction. The previous rule (pre-1982) was worded slightly differently and used "implemented" as an alternative to "constructed," apparently referring to actions that affect the environmental but do not build something (e.g., pesticide application programs). When the 1982 rules were drafted, the slight revision of the language obscured this connotation, apparently inadvertently because the SONAR does not indicate this was done by intent. The EQB staff believes the	-Change as follows: revise to clarify that the ongoing operation of a project is not intended to be included within "implementation."

	language ought to be revised to avoid the implication that the post-permitting, post-construction, operation of a project is subject to environmental review.	
28. 4410.4600, subp. 2, item E, standard exemption	This item still refers to projects "for which environmental review has already been initiated under the prior rules," meaning the pre-1982 rule amendments. The current rules nowhere actually state that once review has been completed, the project is not subject to review again (unless the conditions for an EIS supplement or a new EAW are met). This could be corrected at the same time as fixing the above problem by rewording this item.	- Change as follows: reword as:"projects for which environmental review has already been completed [delete "initiated"]." Also add a disclaimer stating that this does not include projects for which some kind of supplemental or updated review is required – e.g., a new EAW pursuant to part 4410.1000, subp. 5, or an EIS supplement pursuant to part 4410.3000
29. 4410.4600, subp. 19, animal feedlots	The 2003 Legislature created exemptions for some feedlots which are not shown in the current rules	-Change as follows: amend the rule to read consistently with the statutory changes.
30. 4410.5200, subp. 1, Monitor publication requirements – state agency notices	Member agencies should review this list and propose any deletions or additions	
31. 4410.5200, subp. 3, Monitor publication requirements – EQB notices	Rule does not now cover AUAR and revised energy facility process notices correctly	-Change as follows: add notice requirements for draft AUAR documents and notices of adoption of AUARs, and update to correctly cover notices under revised ER procedures for energy facilities.
32. 4410.6200, subp. 1, item A, EIS cost inclusions- RGU staff costs	This item requires the recovery of RGU staff costs, even if the staff involved are paid out of the general fund. State RGUs have found this requirement to be troublesome in those cases.	-Change as follows: add qualifying phrase at end: "unless the RGU elects to waive these costs."
33. 4410.6500, payment of EIS costs	The law does not now provide that delays	Add wording, coordinated with revisions at

	by the proposer in paying EIS costs "toll" the deadline for completion of the EIS	part 4410.2800, subp. 3, that the EIS completion deadline is extended if the proposer fails to pay assessed costs on time.
34. 4410.6500, subp. 1, item A, EIS cost payment schedule	The rule does not give a schedule for payment of EIS scoping costs for those cases where the EIS was ordered on the basis on an EAW.	-Change as follows: At end of 1st sentence add phrase: "or within 5 days of issuance of the positive declaration."
35. 4410.6500, subp. 6, notice of EIS cost final payment	Rule requires roundabout method of notifying state agencies that EIS final payments have been made and the prohibition on permit issuance is over	-Change as follows: in 2nd sentence, replace "EQB" with "RGU."
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